Grace Industries, LLC *and* Highway Road and Street Construction Laborers Local 1010, Laborers International Union of North America, AFL–CIO, Petitioner-Intervenor and United Plant and Production Workers, Local 175, International Union of Journeymen and Allied Trades, Petitioner-Intervenor. Cases 29–RC–012031 and 29–RC–012043

June 18, 2012

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On December 28, 2011, the Regional Director for Region 29 issued a Second Supplemental Decision, in which he found a petitioned-for unit comprising all "laborers performing site and ground improvement, utility, paving and road building work and all related work . . . regardless of material used" to be an appropriate unit for bargaining, and found a petitioned-for unit comprising employees who "primarily perform asphalt paving, including foremen, rakers, shovelers, screedmen, micro pavers, AC paintmen and liquid tar workers, seal coaters, small equipment operators, landscape planting planters, and fence safety surface installers" but excluding "all persons primarily performing concrete paving" to be an inappropriate unit for bargaining.[1] Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, Petitioner-Intervenor United Plant and Production Workers, Local 175, International Union of Journeymen and Allied Trades (Local 175), filed a timely request for review. Local 175 contends that a unit comprising employees who "primarily perform asphalt paving" is an appropriate unit.

On February 8, 2012, the Board granted Local 175's request for review. Thereafter, Petitioner-Intervenor Highway Road and Street Construction Laborers Local 1010, Laborers International Union of North America, AFL–CIO (Local 1010), filed a brief on review.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record in this proceeding, including the brief on review, we reverse the Regional Director and find that a unit comprising employees who "primarily perform asphalt paving" is also an appropriate unit for bargaining.

[1] Both petitioned-for units are limited to work performed in the five boroughs of New York City.

[2] Local 1010's brief on review contains exhibits that it requests be admitted into the record. These exhibits are irrelevant to deciding the unit issue, so we deny the request.

Facts

The Employer is a contractor that provides construction services in the New York metropolitan area. In this case, the specific services involved are asphalt paving, concrete paving, and related preparatory work performed on roads, bridges, and airport runways in the five boroughs of New York City.[3]

In general, roads and runways have a concrete base and are finished (or topped) with either asphalt or concrete. In the New York City area, most roads are currently finished with asphalt, and the jobs described in the record primarily involve repairing and repaving existing asphalt-finished roads. Preparation work for such jobs involves job layout, demolition of existing structures, excavation, installation of drainage (such as catch basins, pipes, or sewers), milling,[4] cleaning the surface of the exposed concrete base (using hand brooms or operator-run mechanical sweepers to remove stray millings), and laying down liquid tar (which ensures the top layer of asphalt will properly adhere to the base). For some jobs, preparation work may also require grading, which involves putting down asphalt millings to serve as a base for the road.[5] Between milling and laying down liquid tar, employees will also repair, i.e., patch cracks in the concrete base. This work typically involves using a saw to cut around the crack, jackhammering out the cracked concrete, and filling the resulting hole with either asphalt (for shallow-depth repairs) or concrete (for full-depth repairs).[6]

Once the necessary preparation work is complete, final paving begins. For asphalt-finished roads, final paving usually involves the use of an operator-controlled asphalt spreader that contains sensors which screedpersons regulate to control the flow of asphalt from the spreader.[7] Screedpersons require training and experience to effec-

[3] The record contains detailed testimony about five of the Employer's jobs, all from 2008 and 2009: the George Washington Bridge, Clearview Expressway, John F. Kennedy International Airport, Staten Island Bridges/Route 440, and Grand Central Parkway.

[4] For milling, an operator runs a milling machine, which removes the top layer of asphalt by grinding it into chips (or millings), while other employees operate the machine's sensors.

[5] A grading machine and bulldozer (run by operators) do most of the grading work, but the employees at issue in this case also shovel and rake the millings, leveling them out as needed, and they may recommend adjustments to the grading machine operator. Of the specific jobs discussed in the record, only one—John F. Kennedy International Airport—clearly involved grading.

[6] It is not clear from the record how, or to what degree, preparation work for concrete-finished roads differs from preparation work for asphalt-finished roads.

[7] Asphalt paving may also be performed without a spreader, in which case the asphalt pavers simply rake, shovel, and tamp the asphalt as needed.

tively operate the spreader's sensors, and must be able to account for the amount of available asphalt, the desired thickness, and slope variations of the surface being paved. Rakers (who use special steel rakes) follow the spreader, ensuring that the asphalt is at the correct height and is properly spread to facilitate water drainage. When the rakers determine that asphalt must be added or taken away, shovelers will add or remove the asphalt using special flat shovels. After the proper amount of asphalt has been laid down, the asphalt is compacted using hand rollers, mechanical rollers (run by an operator), or tampers (a small compactor that bounces up and down on the asphalt). Because asphalt is hot (up to 350 degrees Fahrenheit), smelly, and sticky, individuals who work with asphalt must be accustomed to the material, and in particular must be able to deal with the heat. Asphalt workers must also be able to contend with the "fluff factor," which requires them to calculate, in advance, to what degree the asphalt will compact based on the weight of the amount laid down.

By contrast, concrete paving involves constructing wooden forms (using a hammer and nails), into which the concrete is poured. After pouring, the concrete is leveled with a wooden or metal straight edge and finished with a float. Unlike asphalt, concrete does not require any raking, shoveling, or compacting once it has been poured, but it requires time—up to 4 weeks—to cure. Working with concrete does not involve the heat, smell, or stickiness associated with asphalt work.

The record indicates that in recent years, employees who perform asphalt paving spend more time in preparation for actual asphalt paving than was once the case. The degree of that difference, however, is unclear. Michael Pino, the Employer's vice president of operations, estimated that asphalt pavers spend 80 percent of their time on preparation work. By contrast, Glenn Patrick, an employee who performs asphalt paving, testified that although he now does more preparation work than he used to, on the Employer's recent jobs he still spent 5–7 hours per day raking, which is not preparation work.[8]

Although there are evident distinctions between the Employer's asphalt pavers and other employees, there is also at least some overlap between the two. The exact degree of overlap is a matter of dispute, but the record establishes the following. First, for most jobs discussed in the record, the Employer utilized separate crews with distinct specializations. A crew led by Foreman Robert Maresco handled the actual asphalt paving work. Glenn Patrick, Anthony DiMaio, Frank Puma, and Giuliano Rozza consistently worked on this crew as screedpersons and rakers. On each job, Maresco's crew also milled asphalt, and for most jobs, it saw-cut concrete and performed patch repair using asphalt. Foreman Jose Morais' crew specialized in catch basin work and concrete curb repair, Carlos Nunes' crew did preparation work for concrete-pouring and other concrete-related work (such as full-depth patch repair and repairing or replacing precast concrete slabs), and Gabe Cavelli's crew specialized in excavation. Second, there was at least some overlap between these crews. Morais, for example, may have assisted in asphalt paving on one job. Patrick testified that on one job (Kennedy International Airport) he assisted Cavelli's crew in excavating a hole, and on another job (Clearview Expressway) he did concrete repair using quickset concrete. And DiMaio testified that he used a compressor to break concrete for a few days on one job (Grand Central). Additionally, various employees would assist in cleaning up after the milling machine. Finally, Maresco's crew did not consist solely of members from one union; instead, it generally included several members of Local 175, two members of Local 1010 (Frank Puma and Giuliano Rozza), and one member of Local 731.[9]

As indicated, each specialized crew had its own foreman. The record also establishes that the Employer specifically asked union hiring halls for asphalt workers when a job required asphalt paving. At the same time, the various crews were commonly supervised by the Employer's project manager and general supervisor.

The record establishes that within New York City, there is a long history of collective bargaining in separate asphalt and concrete units. Historically, the Sheet Asphalt Workers Local Union 1018 (Local 1018) represented asphalt pavers, while Local 1010 represented concrete workers.[10] Roland Bedwell, a Local 175 witness and former Local 1018 member, testified, without contradiction, that Local 1018 was established as an asphalt workers' local sometime in the late 1930s or early 1940s, and the record contains a collective-bargaining agreement between Local 1018 and the General Contractors Association of New York (GCA) that was effective from July 1, 1972 to June 30, 1975. The record contains similar contracts between Local 1018 and the GCA spanning July 1, 1993 to June 30, 1999, and a contract between Local 1018 and the New York Independent Contractors Alli-

[8] Patrick is also a screedperson, so his raking estimate does not include all of his asphalt paving work.

[9] Local 731's full name is Building, Concrete, Excavating and Common Laborers Union Local 731 of Greater New York, Long Island and Vicinity of the Laborers International Union of North America, AFL–CIO. Both petitioned-for units specifically exclude members of Local 731, as well as the operators noted above.

[10] Like Local 1010, Local 1018 was affiliated with the District Council of Pavers and Road Builders of the Laborers' International Union of North America, AFL–CIO.

ance (NYICA) from July 1, 1999, to June 30, 2002. These agreements set wage rates for the classifications of screedpersons, rakers, tampers, and "all other men."[11] The record also contains agreements between Local 1010 and GCA or NYICA from July 1, 1996, to June 30, 2002. In contrast to the Local 1018 contracts, these agreements set wage rates only for the classifications of formsetters and laborers.[12] These differing classifications are reflected in the prevailing wage schedule set by the Office of the Comptroller for the city of New York.[13]

At some point in the early 2000s, Local 175 emerged as a competitor to Local 1018. The record contains agreements between Local 175 and NYICA effective from July 1, 2005, to June 30, 2011, that include unit descriptions and classifications similar to the GCA-Local 1018 contracts (screedperson, raker, tamper/shoveler/driver/sawcutter/all other incidental work).[14]

In about 2005, Local 1010 and Local 1018 were both placed in trusteeship by the Laborers' International Union of North America (LIUNA). The record does not reveal the precise reasons for this action, but it apparently was related to allegations that Local 1018's leadership had ties to organized crime. The trusteeships lasted for several years, ending not later than 2009. Sometime in 2009 or 2010, Local 1010 and Local 1018 merged, and the resultant organization retained the Local 1010 label. The reasons for the merger are not clear from the record. Following the merger, Local 1010 and the GCA entered into a Memorandum of Agreement in May 2010, which amended an existing Local 1010-GCA contract, effective from July 1, 2005, to June 30, 2012. Among other things, the existing agreement was revised to encompass employees who perform paving work "regardless of the material used" and to include asphalt worker classifications (screedperson, raker, and shoveler). The revised agreement adheres to the historical wage difference between asphalt pavers and other workers, under which asphalt paving classifications make about $2 an hour more than the corresponding concrete classifications.[15]

In 2006, the Employer purchased the assets of Grace Industries, Inc., which was bankrupt.[16] Shortly after its creation, the Employer signed an agreement designating the GCA as its collective-bargaining agent, but the Employer also signed an agreement designating NYICA as its collective-bargaining agent. Accordingly, the Employer was apparently a party to agreements with both Local 1010 and Local 175. As noted above, the Employer employed members of both Local 1010 and Local 175 on jobs through at least 2009, and paid them according to their respective collective-bargaining agreements.

Local 1010 filed the first of the instant petitions on April 25, 2011, and Local 175 filed the second petition on April 27, 2011. Local 175's petition seeks a unit including employees who "primarily perform asphalt paving" but excluding "all persons primarily performing concrete paving," whereas Local 1010 seeks a unit of laborers performing "paving and road building and all related work . . . regardless of the material used."

THE REGIONAL DIRECTOR'S DECISIONS

The Regional Director's Second Supplemental Decision essentially reiterates findings he made in a Decision and Direction of Election dated August 18, 2011. In that decision, he found that Local 175's petitioned-for unit was inappropriate. Local 175 filed a request for review of the Decision and Direction of Election and, on December 8, 2011,[17] the Board issued an Order granting the request for review and remanding the case to the Regional Director for further consideration as the decision raised substantial factual issues.[18]

In both decisions, the Regional Director acknowledged the differences between asphalt paving and concrete-related work and noted the long history of separate bargaining for asphalt paver units in New York City. The Regional Director declined to give weight to the bargaining history, however, because (1) it was based on agree-

[11] The 1972–1975 agreement between Local 1018 and GCA does not contain the screedperson classification.

[12] Local 1010's agreements did not explicitly exclude asphalt work, but did not include it in a lengthy list of the types of work covered.

[13] The prevailing wage schedule set by the Office of the Comptroller of the city of New York effective from July 1, 2009, through June 30, 2010, specifies rates for paver & roadbuilder–concrete (form setter), laborer (paving & roadbuilding), paver & roadbuilder–asphalt (asphalt raker), paver & roadbuilder–asphalt (tamper), and paver & roadbuilder–asphalt (screenperson, micro paver).

[14] The Local 175 agreements also set wages for an "AC/Paintman, Liquid Tar" classification.

[15] Under the terms of the GCA-Local 1010 Memorandum, between July 1, 2010, and June 30, 2011, screedpersons made $44.35 per hour, rakers made $43.86 per hour, and shovelers made $40.56 per hour, whereas formsetters made $41.58 per hour and laborers made $37.71 per hour. Similarly, under the prevailing wage schedule in evidence, screenpersons make $42.77 per hour, rakers $42.30 per hour, and tampers $39.25 per hour, whereas formsetters make $40.20 per hour and laborers make $36.50 per hour.

[16] The Regional Director made no finding as to whether the Employer is a successor to Grace Industries, Inc., and the issue was not litigated at the hearing. Resolution of this issue is unnecessary for deciding this case.

[17] In the interim, the Region conducted an election in the unit found appropriate by the Regional Director. Local 175 filed objections to the conduct of the election which are not at issue here. The ballots have been inadvertently counted, but no certification has issued.

[18] The Board also directed the Regional Director to consider the case in light of *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011). Concurring, Member Hayes stated that, under *Specialty Healthcare* and his dissenting view, a remand was necessary to explain why the asphalt-only unit was not appropriate.

ments made under Section 8(f) of the Act; (2) the "asphalt-concrete division was based, at least in part, on internal LIUNA considerations not necessarily related to any inherent or inalterable difference" between the two types of work; (3) Local 1010 no longer agreed that separate units were appropriate, indicating that the bargaining history had been "scuttled"; and (4) the asphalt-concrete division is not observed elsewhere in the State of New York. The Regional Director therefore found that there was "no rational reason to continue the artificial separation" because the two types of work have never been totally distinct, asphalt pavers now do more preparatory work, and there is "significant" overlap between asphalt pavers and other employees, who work side-by-side in combined crews under common supervision. In support of his findings, the Regional Director cited *Premier Plastering, Inc.*, 342 NLRB 1072 (2004), in which the Board declined to give weight to historical units based solely on an interunion jurisdictional agreement that had been "scuttled," and *A. C. Pavement Striping Co.*, 296 NLRB 206 (1989), where the Board gave little weight to separate bargaining history in light of the interchangeable functions of the two groups of employees involved.

Analysis

As Local 1010's petitioned-for unit is an appropriate unit,[19] the sole issue before us is whether Local 175's petitioned-for unit is also an appropriate unit for bargaining. Contrary to the Regional Director, we find that the record establishes that a unit of asphalt pavers is appropriate.

In the construction industry, the Board has found that a "readily identifiable and homogenous group with a community of interests separate and apart from other employees" is an appropriate unit for bargaining. See *R. B. Butler, Inc.*, 160 NLRB at 1600. "[T]he fact that other employees perform some of the same tasks is not sufficient in itself to render the requested unit inappropriate." *Charles H. Tompkins Co.*, 185 NLRB 195, 196 (1970). In determining whether a community of interest exists, the Board examines factors such as mutuality of interests in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. *Ore-Ida Foods, Inc.*, 313 NLRB 1016, 1019 (1994), enfd. mem. 66 F.3d 328 (7th Cir. 1995).

Here, the record establishes that employees who primarily perform asphalt paving have distinct skills and functions. Screedpersons must be able to operate sensors on the paving machine, a skill which requires training and experience; they must know how to properly set the grade to ensure water runs off the paved surface; and they must be able to judge the amount of asphalt to be spread. Although rakers do not operate the sensors on the asphalt paving machine, they must be able to fix any mistakes made by the screedpersons, and thus must be able to account for grade and water runoff. And all asphalt workers, including shovelers and tampers, must be familiar with the properties of asphalt, and must account for the "fluff factor." That the asphalt workers have distinct skills and functions is reflected by the separate crew the Employer uses for asphalt paving, by the separate classifications set forth in the relevant collective-bargaining agreements and area prevailing wage schedule, and by the fact that when the Employer needs to hire an employee to work with asphalt, the Employer specifically asks for such an employee.

Additionally, asphalt workers have distinct interests in wages and working conditions. As previously noted, asphalt classifications are paid at a notably higher rate than formsetters or concrete laborers: under the prevailing wage schedule included in the record and the Memorandum of Agreement merging the GCA's agreements with Local 1010 and Local 1018, asphalt employees make over $2 per hour more than comparably classified concrete classifications. Asphalt workers also have distinct working conditions given the nature of hot asphalt. In working with asphalt, they utilize distinct tools and equipment, including steel rakes, flat shovels, paving machines, tampers, and both hand and mechanical rollers.

Although the record leaves some uncertainty over the precise degree of overlap, interchangeability, and contact between asphalt pavers and other employees, we do not agree with the Regional Director's finding of "significant overlap" between asphalt pavers and other employees. In making this finding, the Regional Director relied on the testimony of Local 175's witnesses. Although we readily agree that Local 175's witnesses establish some degree of overlap between asphalt pavers and other employees, this alone does not render a separate unit of asphalt pavers inappropriate. See *Burns & Roe Services Corp.*, 313 NLRB 1307, 1309 (1994) ("some overlap of lesser skilled duties does not preclude finding the petitioned-for unit appropriate"); *Charles H. Tompkins*, supra at 196. Nor do we find that the testimony of Local 175's wit-

[19] Local 175 disputes the Regional Director's statement that it conceded the appropriateness of Local 1010's petitioned-for unit. Assuming Local 175 has not conceded this issue, we would find Local 1010's petitioned-for unit is appropriate in any event, because, as an overall unit, it is presumptively appropriate. See *R. B. Butler, Inc.*, 160 NLRB 1595, 1599 (1966). Local 175 has offered no argument as to why this presumption should be disturbed in this case.

nesses about the Employer's specific jobs demonstrates that the overlap between asphalt pavers and other employees is "significant."

The Regional Director is correct that Local 1010 members assisted in asphalt milling and cleanup, asphalt patching, dumping asphalt from a truck, and raking and shoveling asphalt. In almost all of these instances, however, the Local 1010 members identified by Local 175's witnesses were Frank Puma and Giuliano Rozza.[20] The record establishes that Puma and Rozza were former members of Local 1018, and therefore almost certainly were experienced asphalt workers. Accordingly, that these two employees performed asphalt work does not establish any degree of overlap between asphalt pavers and other employees.

The Regional Director is also correct that members of Local 175 assisted in "concrete-related work and other preparation work, such as milling asphalt, saw-cutting and jack-hammering out old concrete, concrete repair, excavation related to sewer installation, and grading." Regarding asphalt milling, Local 175's witnesses did not indicate that anyone other than Maresco's crew did this work.[21] Local 175's witnesses also consistently testified that when they saw-cut and jackhammered concrete, it was usually for shallow-depth concrete repairs. As previously described, such repairs involve the use of asphalt, and Patrick consistently stated that Maresco's crew handled such repairs, as opposed to Nunes' and Morais' concrete crews, which handled the full-depth repairs. Thus, the remaining evidence of Local 175 members doing "concrete-related work" cited by the Regional Director is that Patrick excavated a hole on one job and did repairs using quickset concrete on another, and that DiMaio used a compressor to break concrete for a few days on one job. This testimony does not, in our view, establish a "significant overlap."

Finally, although the Regional Director correctly notes that Local 175's witnesses testified that members of different unions work side-by-side on one crew—Maresco's—and are in frequent contact with each other, this again overlooks the fact that the Local 1010 members on Maresco's crew were Puma and Rozza, who had a background in asphalt paving. Aside from this circumstance, Local 175's witnesses repeatedly indicated that asphalt and concrete workers did not work side-by-side or on the same crews with any frequency, with the possible exception of cleanup after milling.[22]

As noted, the Regional Director's finding of "significant overlap" relies on the testimony of Local 175's witnesses. Employer witness Michael Pino gave testimony that frequently contradicted Local 175's witnesses.[23] For example, Pino testified that the Employer's crews had no set specialties, that he made work assignments based on personalities rather than skills in asphalt or concrete paving, that Maresco's crew often did concrete work, that Nunes' and Morais' crews often did asphalt work, and that Patrick frequently performed concrete-related work.[24] Local 1010's brief on review relies in large part on Pino's testimony on these and similar matters. The significance of this testimony is diminished, however, because on cross-examination, Pino admitted that Maresco's crew specialized in milling and asphalt paving (precisely the work Patrick claimed the crew did),[25] and that he would assign members of Maresco's crew to asphalt paving because of their familiarity with asphalt. Moreover, Pino's testimony about asphalt pavers' alleged concrete work was somewhat general, and was rarely clear on how frequently or for how long asphalt pavers performed such tasks. The same is true of Pino's testimony about other Local 1010 members (besides Puma and Rozza) doing asphalt work.

Even if Pino's testimony establishes other instances of Maresco's crew doing concrete work, or of concrete workers doing asphalt paving, Pino's testimony is not sufficient to render Local 175's petitioned-for unit inap-

[20] Patrick testified that on one job, Jose Morais "maybe" assisted the paving crew. Even if this uncertain testimony were credited, it does not support finding "significant overlap" between asphalt and concrete workers.

[21] This is also true of grading. Local 1010 makes much of the testimony that Local 175 members performed grading work, but only one of the jobs described explicitly involved grading, and Patrick's limited testimony about grading does not indicate that members of Local 1010 (other than Puma and Rozza) assisted in such work.

[22] In his discussion of the facts, the Regional Director cited testimony of DiMaio that on one job, "[w]e were doing everything" and "[w]e all spoke together like family." The Regional Director did not explicitly link this testimony to his findings of overlap and contact, but Local 1010 emphasizes this testimony as supporting these findings. DiMaio made these statements, however, in explaining how he knew which unions his crew members belonged to on particular jobs. Elsewhere, he testified that his crew did asphalt work and that although he saw other crews doing concrete work, his crew did not work in close proximity to those crews.

[23] Local 1010 witness Lowell Barton also gave testimony that was directly at odds with Local 175's witnesses. Barton's testimony, however, involved jobs that he worked on between 1998 and 2002 for Grace Industries, Inc. Such testimony is too remote in time to be given weight.

[24] The Regional Director acknowledged that Pino's testimony could not be reconciled with that of Local 175's witnesses but made no credibility resolutions, in keeping with representation hearing procedures. See *Marian Manor for the Aged & Infirm, Inc.*, 333 NLRB 1084, 1084 (2001) ("a preelection hearing is investigatory in nature and credibility resolutions are not made").

[25] Pino also admitted that Morais' crew specialized in traffic protection (and also did catch basin work, curb repair, and full-depth concrete repair work), Nunes' crew in concrete preparation work, and Cavelli's crew in sheeting and excavation.

propriate. First, Pino's testimony—even where it is specific—indicates that other employees spend less than half of their time performing asphalt paving duties. For example, Pino admitted that Nunes' crew spent about 50 percent of its time doing concrete preparation work, vaguely alluded to other specializations, and testified that the crew did asphalt paving "at times." Likewise, apart from generalized testimony that Morais' crew did asphalt paving, Pino specifically identified only 6 days on one job when that crew did asphalt work. Given Pino's admission that these two crews specialized in various concrete-related work, this testimony suggests that these crews spend significantly less than half of their time on asphalt paving. In similar circumstances, the Board has found that such overlap does not render a petitioned-for unit inappropriate. See *Hychem Constructors, Inc.*, 169 NLRB 274, 276–277 (1968) (fact that other employees did pipefitters' work did not render separate unit of pipefitters inappropriate, as other employees spent less than half of their time performing less skilled pipefitting jobs); *Charles H. Tompkins*, supra at 196 (fact that other employees performed work similar to that of field engineers did not render separate engineers unit inappropriate, as other employees spent significantly less than half their time performing similar work).

Second, although it is clear that asphalt pavers occasionally perform other duties, Pino's testimony suggests that such work was incidental and occasioned by an absence of paving work. Thus, Pino testified that Patrick did "all the activities" at the Kennedy Airport job when there was no paving or asphalt preparation work for him to do; linked the asphalt pavers only to patch repair on the Grand Central Parkway job, while admitting that Morais' and Nunes' crews did about 75 percent of the patch work on that job; and explicitly agreed with Patrick's characterization of the Staten Island/Route 440 job, which was that Patrick and a few asphalt pavers spent 2–3 nights out of 2 months on the job doing concrete patch repair and otherwise did asphalt milling and paving. The Board has found that similar instances of overlap do not render a petitioned-for unit inappropriate. See, e.g., *Dick Kelchner Excavating Co.*, 236 NLRB 1414, 1415 (1978) (separate unit of drivers remains appropriate where drivers also worked as laborers "to give them something to do" when there were no driving tasks to perform); *Hydro Constructors, Inc.*, 168 NLRB 105, 105 (1967) (separate units of laborers appropriate even though laborers and drivers sometime perform same tasks because laborers "are engaged a substantial majority of their time in laborers' duties"). On the whole, Pino's testimony clearly supports finding an overall unit appropriate, but it does not render Local 175's petitioned-for unit inappropriate.

Given the asphalt pavers' distinct skills and functions, distinct interests in wages and working conditions, and the lack of a substantial overlap with other employees, Local 175's petitioned-for unit is an appropriate unit for bargaining. Although all workers on a job are ultimately supervised by the Employer's project manager and general supervisor, this circumstance does not outweigh the other factors supporting the appropriateness of Local 175's petitioned-for unit. See, e.g., *Hydro Constructors*, supra (common upper-level supervision outweighed by other factors favoring separate unit).

The appropriateness of Local 175's petitioned-for unit is further confirmed by the relevant bargaining history. The Board's traditional deference to bargaining history "is generally applicable in the construction industry," and bargaining history based on 8(f) agreements may be determinative where only limited evidence concerning community-of-interest factors is available. *P. J. Dick Contracting*, 290 NLRB 150, 151 (1988).[26] Of course, the Board does not give substantial weight to bargaining history that "departs from statutory provisions or clearly established Board policy." *A. C. Pavement Striping Co.*, 296 NLRB 206, 210 (1989), quoting *William J. Keller, Inc.*, 198 NLRB 1144, 1145 (1972). Nor will the Board give weight to a history of separate units based largely on the convenience to the unions involved. See, e.g., *Premier Plastering, Inc.*, 342 NLRB 1072, 1072–1073 (2004).

Here, the Employer, through GCA and NYICA, previously bargained in separate asphalt and concrete units, at least into 2010. This situation appears to have changed only due to the merger of Local 1010 and Local 1018. Apart from that merger, undertaken for reasons that appear to be unrelated to the work, there is an extensive history of separate asphalt and concrete units in New York City. Roland Bedwell testified, without contradiction, that Local 1018 represented separate asphalt units as far back as the late 1930s, and the various collective-bargaining agreements in the record demonstrate that units similar to Local 175's petitioned-for unit have been recognized since at least the early 1970s. Although this general history does not necessarily implicate the Employer, area practice and the history of bargaining in the industry are relevant considerations in determining the appropriateness of a petitioned-for unit. See *R. B. Butler, Inc.*, 160 NLRB at 1597–1598 (citing bargaining history in industry and area as evidence supporting a petitioned-for unit of construction laborers); *Del-Mont Construction Co.*, 150 NLRB 85, 87 (1964) (finding appropriateness

[26] Local 175 argues that the bargaining history is in fact based on agreements governed by Sec. 9(a), but it points to no record evidence that supports this contention.

of separate unit of heavy-equipment operators supported by historical industry practice).

The reasons cited by the Regional Director and Local 1010 for according little weight to this history of separate bargaining find no support in the record or in extant law. First, there is no evidence supporting the Regional Director's finding that the history of bargaining in separate asphalt and concrete units was based "at least in part" on internal LIUNA considerations. Indeed, what evidence there is suggests that the Local 1010-Local 1018 merger—not the historical work separation—was the result of internal considerations.[27] In that regard, it is notable that the merged agreement between GCA and Local 1010 retains the distinctions between asphalt and concrete classifications and wage rates, and that the city of New York continues to observe the asphalt-concrete distinction in setting prevailing wage rates. Second, the bargaining history outside of New York City is of limited relevance to this case, and in any event, the record does not clearly establish what the statewide history is.[28] Finally, the cases cited by the Regional Director are readily distinguishable. In *A. C. Pavement Striping*, supra, the Board refused to give weight to a history of bargaining in two separate units where the employees in those two units had interchangeable job functions, thus indicating that the bargaining history was solely the result of "historical accidents." See id. at 210. Here, the separate history is not solely the result of historical accident, and, as the Regional Director himself found, asphalt and concrete workers are not interchangeable. Likewise, in *Premier Plastering*, supra, the Board found that bargaining history was the "only fact that could justify" a petitioned-for unit that corresponded to a historical unit. Id. at 1073. As the foregoing discussion makes clear, here the relevant bargaining history is not the only fact that justifies the historical separation of asphalt and concrete units.[29]

To be clear, the bargaining history in this case is not controlling. Even so, it is a relevant consideration in our analysis, and it supports our finding that a unit limited to asphalt pavers is an appropriate unit for bargaining.

Conclusion

For the reasons discussed above, we find that a unit comprised of employees who "primarily perform asphalt paving" is an appropriate unit for bargaining, as these employees are readily identifiable and have a community of interests separate from other employees. The fact that asphalt pavers have historically bargained in separate units in the New York City area further supports this finding. Having found that a unit comprised of laborers who perform "paving and road building work and all related work . . . regardless of material used" is also an appropriate unit, we find, pursuant to our usual practice,[30] that a self-determination election is appropriate under these circumstances.[31]

ORDER

This proceeding is remanded to the Regional Director for appropriate action consistent with the Decision and Order.

[27] There is little evidence regarding the internal workings of the LIUNA and its locals. As noted above, the former leaders of Local 1018 allegedly had ties to organized crime. In December 2005, Locals 1010 and 1018 were placed in a trusteeship, which ended not later than 2009. The two locals merged in 2009 or 2010, after the trusteeship ended. None of these circumstances shows that the prior longstanding history of separate asphalt and concrete bargaining was due to internal convenience, per the Regional Director's findings, or that the separation was an artificial one created by Local 1018's former leaders, as argued by Local 1010.

[28] Local 1010 introduced two exhibits concerning the statewide practice regarding asphalt and concrete units. Although these exhibits seemingly indicate that the New York State Department of Labor treats asphalt and concrete workers somewhat differently from the Office of the Comptroller for the city of New York, the only arguable evidence of bargaining history contained in these exhibits is a letter from the Eastern New York Laborers' District Council that states that its locals "do not make any distinction in dispatching our members for asphalt or concrete work."

[29] The "scuttling" of the bargaining history that took place in *Premier Plastering* also differs from the situation in this case. In *Premier Plastering*, the Bricklayers and Operative Plasterers had been bound to a nationwide agreement establishing geographical limitations on each others' jurisdiction. See id. at 1072. The dispute underlying *Premier Plastering*—which the Board described as "unique"—arose when the Operative Plasters unilaterally revoked the agreement, a move upheld by the AFL–CIO. See id. Here, by contrast, there was never an interunion agreement regarding geographical jurisdiction, a revocation of the agreement, or an upholding of that move by any applicable governing bodies; rather, there is simply a long history of bargaining in units limited to asphalt pavers.

[30] See *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

[31] It is therefore unnecessary to address the Regional Director's finding that *Specialty Healthcare*, supra, does not apply to this case.